No. 86-228

In The

Supreme Court of the United States

October Term, 1986

JUOZAS KUNGYS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

DONALD J. WILLIAMSON
Counsel of Record
WILLIAMSON & REHILL, P.A.
Attorneys for Petitioner
Gateway One
Newark, New Jersey 07102
(201) 643-5100

On the Brief

DONALD J. WILLIAMSON
MICHAEL F. REHILL
IVARS BERZINS

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Third Circuit Court of Appeals misconstrued the Government's heavy burden of proving the materiality of a misrepresentation by clear, unequivocal and convincing evidence, when it held that the Government, under the second prong of *Chaunt v. United States*, 364 U.S. 350 (1960), need only establish a mere "probability" that an investigation would have revealed an independent "disqualifying fact" making the petitioner ineligible for a visa had the petitioner made truthful statements as to what it held were his immaterial date and place of birth under the first prong of *Chaunt*?

2. Which, if any, of the several conflicting and divergent formulations interpreting the "second prong" of *Chaunt* governs the heavy burden of proving a "material" misrepresentation in order to denaturalize a citizen?

3. Whether the same test or tests of materiality for revoking citizenship applies at the visa application stage?

4. Whether the Third Circuit's standard of plenary review, pursuant to which it made *de novo* findings and drew inferences as to unalleged "facts" directly contrary to the findings of the District Court and to the record, on whether an investigation would have ensued and whether the petitioner was ineligible for a visa, violated Rule 52(a) of the Federal Rules of Civil Procedure and deprived the petitioner of his constitutional right to due process of law?

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The opinion of the United States District Court for the District of New Jersey (Debevoise, D.J.) is reported at 571 F. Supp. 1104 (Pet. App. C).

JURISDICTION

The judgment of the Court of Appeals reversing the judgment of the District Court dismissing the complaint and remanding for denaturalization proceedings was entered on June 20, 1986 (Pet. App. B). The petition for a writ of certiorari was filed on August 9, 1986 and was granted on November 10, 1986. Jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 340(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1451(a) provides for revocation of a naturalized citizen's order and certificate of naturalization if they "were illegally procured or were procured by concealment of a material fact or by willful misrepresentation" (Pet. App. D).

STATEMENT OF THE CASE

Respondent, through the Office of Special Investigations of the Criminal Division of the United States Depart-

ment of Justice, filed a five count Complaint in July 1981, amended in July 1982, seeking to revoke the February 1954 grant of citizenship to petitioner Juozas Kungys, a Lithuanian refugee, pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, as amended in 1961, 8 U.S.C. § 1451(a).

In Count V, "Procurement of Citizenship by Concealment of Willful Misrepresentation", respondent alleged, *inter alia*, that petitioner's misrepresentations as to his date and town of birth in Lithuania as contained in his January 1947 application for Immigration Visa and as continued in his October 1953 Petition for Naturalization constituted concealments of "material" facts and thus were grounds for denaturalization. (J.A. 18-19).

After a thirteen day bench trial, which extended over three months, the District Court dismissed all five of the counts of the Complaint, as amended, and in a lengthy opinion set forth extensive findings of fact and conclusions of law. (Pet. App. C, 39a-137a). As to the issues on which this Court granted certiorari, the District Court found that had the petitioner provided the correct information on his immigration forms that he was born on September 21, 1915 in the rural community of Reistru, Lithuania, instead of the incorrect information of being born two years earlier on October 4, 1913 in the city of Kaunas, Lithuania, his visa nevertheless would have been issued since "There is nothing to suggest that his having been born on September 21, 1915 in Reistru would have had any effect whatsoever." (Pet. App. C, 119a).

The District Court held that there was no reason not to apply the materiality test of *Chaunt v. United States*, 364 U.S. 350 (1960), governing misrepresentations in petitions

for naturalization, to misrepresentations made during the visa application stage. (Pet. App. C, 135a). The District Court then made findings under the first prong of *Chaunt* as well as to each of the formulations of the second prong of *Chaunt* as set forth in the various opinions in *Fedorenko v. United States*, 449 U.S. 490 (1981). (Pet. App. C, 135a-137a).

Under the first prong of *Chaunt* as to whether "facts were suppressed which if known, would have warranted denial of citizenship", the District Court found that "None of the suppressed facts, if known, would have warranted denial of citizenship." (Pet. App. C, 135a). The Third Circuit Court of Appeals agreed with the District Court that under the first prong of *Chaunt* the government did not establish the requisite materiality (Pet. App. A, 20a-21a), and expressly noted that:

> Country of birth determined eligibility under the quota system. We note that although the defendant misrepresented his place of birth, he did not misrepresent in what country he was born. Therefore, his misrepresentation, in and of itself, did not have impact on his eligibility for a quota visa in general." (Pet. App. A, 30a).

As to whether under the second prong of materiality in *Chaunt*, "their disclosure [correct date and town of birth] might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship", the District Court found that "The government's own proofs tend to establish that truthful answers by defendant would *not* have resulted in an investigation" (Brackets added, but emphasis in original text, Pet. App. C, 135a). The District Court further found that "Disclosure of these facts would not have made defendant ineligible for

a visa." *(Ibid.)* After additional analysis, the District Court concluded that petitioner's "misrepresentations and concealments would not be deemed material for Section 340(a) purposes under any of the interpretations of the second *Chaunt* test." *(Ibid.)*

The other counts of the Complaint (Counts I, II, III and IV), which were dismissed by the District Court, were predicated on the "illegal procurement" of citizenship provision added by the 1961 amendment to the Immigration and Nationality Act of 1952.[1] In dismissing Counts I and III, the District Court found that the circumstances and manner in which Soviet depositions were taken made them "unreliable" and to admit them as substantive evidence "would violate fundamental considerations of fairness." (Pet. App. C, 86a). It held that "the admissible evidence is insufficient to sustain the government's charges that defendant participated in the July and August 1941 killings in Kedainiai." (Pet. App. C, 110a). The Third Circuit left undisturbed those findings of fact and conclusions of law. (Pet. App. A, 6a).

In Count II, the government alleged that petitioner illegally procured his visa by submitting misinformation in his immigration forms as to his date and place of birth, wartime places of residence, wartime occupations and marital status. Prior to trial, the District ordered all allegations stricken, with prejudice, as to petitioner's marital status upon proof that in fact he was married on August 24,

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[1] The inapplicability of the 1961 amendment to petitioner, who was naturalized in 1954, was never reached because the District Court concluded that the materiality requirement embodied in "illegal procurement" overlapped the dismissal ground of "material misrepresentation." (Pet. App. C, 124a) (See *United States v. Riela*, 337 F.2d 986, 989 (C.A. 3, 1964)).

1943 to Sofia Anuskeviciute in Kaunas, Lithuania. (Order of January 31, 1983, docket entry 112, J.A. 1). After trial, the District Court found that residence in Kedainiai and being a bookkeeper in a brush and broom shop would not have made petitioner ineligible for a visa. (Pet. App. C, 135a). The Third Circuit confirmed the District Court's findings and conclusions as to the lack of materiality of petitioner's omissions concerning occupations and residences, in holding that ". . . they do not pass the *Chaunt* materiality test." (Pet. App. A, 33a).

Both the District Court and the Third Circuit rejected the government's argument contained in Count IV that giving any false testimony, irrespective of materiality, is grounds for denaturalization under 8 U.S.C. § 1451(a) for lack of "good moral character" under 8 U.S.C. § 1101(f)(6). The Third Circuit correctly distinguished the naturalization process from that of denaturalization in holding that "We reject the proposition that the government can avoid the *Chaunt* materiality test by alleging illegal procurement in connection with section 1101(f)(6)." (Pet. App. A, 25a).

The Third Circuit, notwithstanding its confirming the District Court's findings and conclusions that the government did not establish the requisite materiality under the first prong of *Chaunt*, felt compelled to "consider the second prong in the *Chaunt* test and articulate our view of this elusive concept while remaining cognizant of its various interpretations." (Pet. App. A, 20a-21a). The Third Circuit then made a *de novo* finding, directly contrary to the express finding of the District Court (Pet. App. C, 135a), that, had petitioner made truthful statements as to his date and place of birth, an investigation "would have ensued." (Pet. App. A, 32a).

Proceeding from the false premise that only victims of Nazi persecution were eligible for non-preference quota immigration visas, the Third Circuit made the *de novo* finding that the obtaining by petitioner of a residency permit (transmitted to the Mayor with a form letter indicating it was "without special conditions or restrictions") in a rural community in southern Germany a few months before the Allies occupied the area would "tend" to show that the petitioner was not a victim of Nazi persecution. (Pet. App. A, 33a). The District Court had found that a former Vice Consul who testified that the Nazi persecutee requirement was contained in the regulations was in error and the government was unable to produce the non-existent regulation. (Pet. App. C, 119a-120a n.7, and Lodging, R. 1298).

The Third Circuit adopted a "probability" standard as to what an investigation under the second prong of *Chaunt* had to show and made the *de novo* findings that had an investigation been made by petitioner's naturalization examiner (who noted his waiver on the petition) "such investigation probably would have resulted in a denial of the petition since it would have tended to prove his ineligibility for a visa in the first instance." (Pet. App. A, 36a-37a).

On June 20, 1986, the Third Circuit entered a judgment reversing the judgment of the District Court and remanding for denaturalization proceedings (Pet. App. A, 30a), which it stayed on July 23, 1986, pending final disposition by this Court. (J.A. 235-236).

SUMMARY OF ARGUMENT

A misstated date and town of birth in an application for a quota immigration visa and in a petition for natural-

ization are not "material" within the meaning and intent of the denaturalization provision of § 340 of the Immigration and Nationality Act of 1952, as amended, since the visa was issued in accordance with federal regulations on the basis of the petitioner's country of birth which determined his eligibility under the quota system. Having been born two years later, and in a rural community in Lithuania instead of a city in Lithuania, would not have had any effect whatsoever on the issuance of an immigration visa under the quota for Lithuania, (Pet. App. C, 119a). As the District Court found, "Disclosure of these facts would not have made the defendant ineligible for a visa." (Pet. App. C, 135a).

There was no visa eligibility requirement, preference or priority, under the regulations then in effect or in the President's directive of December 22, 1945 that a displaced person or refugee *also* had to be a victim of Nazi persecution. Irrespective of whether petitioner was or was not a victim of Nazi persecution, he was still eligible for a non-preference immigration visa under the quota for Lithuania since, as the District Court expressly found (and the Court of Appeals confirmed), he was a Lithuanian displaced person who fled from the Russian Front. (Pet. App. C, 115a-116a; Pet. App. A, 7a). As the District Court further found, the uncorroborated testimony of a former Vice Consul that only Nazi persecutees were eligible for non-preference quota visas was in error.

Obtaining a residence permit, as a refugee, from rural, civil authorities in Germany a few months before the Allied Forces liberated the area was neutral conduct which could not support a tendential inference that petitioner was not a victim of Nazi persecution. The drawing of such an unwar-

ranted factual inference by the Court of Appeals was an improper *de novo* finding contrary to Rule 52(a) of the Federal Rules of Civil Procedure and the Supreme Court's holdings in *Pullman-Standard v. Swint*, 465 U.S. 273 (1982) and *Icicle Seafoods, Inc. v. Worthington*, 106 S. Ct. 1527 (1986). Moreover, the obtaining of such a residency permit was not only irrelevant and immaterial, but even as to the bogus Nazi persecutee visa requirement could not negate the District Court's finding that there was independent support for the fact that petitioner was active in the anti-Nazi resistance movement in Lithuania during the Nazi occupation and thereby subjected himself to the risk of being persecuted by the Nazis for high treason. As the District Court found, the Government did not meet its burden of disproving that the petitioner was a member of the anti-Nazi resistance movement in Lithuania as represented on the Lithuania Ex Political Prisioner's Committee Certificate (Pet. App. C, 119a-120a n.7).

Both the District Court and the Court of Appeals were correct in concluding that misstated date and place of birth in immigration papers did not, in and of themselves, demonstrate a lack of moral character and were not material under the first prong of *Chaunt v. United States*, 364 U.S. 350 (1960) since the suppressed, correct date and place of birth were not facts "which, if known, would have warranted denial of citizenship."

The record below supports the District Court's finding that no investigation would have occurred had the petitioner set forth his correct date and place of birth in his immigration papers. The Court of Appeals *de novo* finding to the contrary violates Rule 52(a) of the Federal Rules of Civil Procedure, is contrary to this Court's holdings in *Pullman-Standard v. Swint*, *supra* and *Icicle Seafoods, Inc.*

v. Worthington, supra, and would constitute a denial of due process to the defendant.

As the District Court correctly concluded, under that formulation of the second prong of *Chaunt* which is consistent with the long established burden on the Government to prove every element of a denaturalization case with clear, convincing and unequivocal evidence which does not leave any issue in doubt, as set forth in *Schneiderman v. U.S.*, 320 U.S. 118 (1943), the Government failed to meet its burden that such an investigation, if conducted, would have uncovered facts justifying denial of citizenship. The Court of Appeals erred in diluting the Government's burden of proof and then finding based on a "probability" standard that obtaining a residency permit "tended" to support the unwarranted inference that petitioner was not a victim of Nazi persecution. The Court of Appeals erred in hypothesizing that the absence of being a victim of Nazi persecution was a disqualifying fact making petitioner ineligible for a visa. No such disqualification existed since displaced persons who fled from the Russian Front were as eligible for quota visas as were victims of Nazi persecution. Thus, there were no underlying facts (disclosed or undisclosed) that would now justify the denaturalization of petitioner.

ARGUMENT

I.

The Court of Appeals Erred in Diluting The Standard of Proof For Materiality In A Denaturalization Suit

Each denaturalization case since this Court's 1943 decision in *Schneiderman v. United States*, 320 U.S. 118, 125

has held that the Government bears the heavy burden in such cases of proving each issue by clear, unequivocal and convincing evidence which does not leave such issue in doubt. Indeed, this Court as recently as *Fedorenko v. United States*, 449 U.S. 490, 505-506 (1981) stated, "Any less exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding." Consistent with that exacting standard of proof, lower courts have applied a "certainty" test to the issue of the "materiality" of concealed facts or misrepresentations in applications for visas or petitions for naturalization under the first prong of *Chaunt v. United States*, 364 U.S. 350, 355 (1960), *i.e.* whether "facts were suppressed which if known, would have warranted denial of citizenship." See *United States v. Kairys*, 600 F. Supp. 1254, 1267, aff'd on other grounds, 782 F.2d 1374 (C.A. 7, 1986).

The District Court herein expressly found that, "None of the suppressed facts, if known, would have warranted denial of citizenship." (Pet. App. C, 135a). The Court of Appeals agreed with the District Court that the government did not establish the requisite materiality of any concealed or misrepresented fact under the first prong of *Chaunt*. (Pet. App. A, 20a-21a).

The Third Circuit, however, felt compelled to examine the additional language in *Chaunt* as to whether, "their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship (the so-called "second prong"). Although the Third Circuit acknowledged that "there is some opinion that the second prong may not contain a standard separate from the first" (Pet. App. A, 21a), it adopted a diluted standard of proof for materiality in holding that

"where the government is able to prove that such investigation *probably* would have led to the discovery of disqualifying facts, then the materiality test under the second prong of *Chaunt* is satisfied." (Pet. App. A, 22a, emphasis in original).

In adopting its "probability" standard of proof based on the Second Circuit's standard in an alien deportation case, *Maikovskis v. INS*, 773 F.2d 435 (C.A. 2, 1985), the Third Circuit noted that the Tenth Circuit in a denaturalization case, *United States v. Sheshtawy*, 714 F.2d 1038 (C.A. 10, 1983) adopted Justice Blackmun's interpretation of *Chaunt* as explicated in his concurring opinion in *Fedorenko*. (Pet. App. A, 18a-19a).

Justice Blackmun, in *Fedorenko*, pointed out that the minimal test of the materiality of a misrepresentation set forth in the majority opinion ("if disclosure of the true facts would have made the applicant ineligible for a visa"), is equivalent to the first prong of *Chaunt* ("facts were suppressed which if known, would have warranted denial of citizenship"). 449 U.S. at 520. He expressly rejected the Fifth Circuit's "possibility" test in *Fedorenko* on the grounds that it would have "diluted materiality." He concurred with the plurality opinion in *Fedorenko* on the grounds it also adhered to the more rigorous standard of proof since the government had demonstrated the actual existence of the disqualifying fact that Fedorenko had been a concentration camp guard and did not reach its conclusion on the basis of the immaterial false statements as to his place of birth.

In *Fedorenko*, Justice Blackmun would have had this Court eliminate the confusion as to whether *Chaunt* created

more than one standard of proving materiality in a denaturalization case either at the visa or petition stage and set forth his reasoning:

> *Chaunt*, to be sure, did announce a disjunctive approach to the inquiry into materiality, but several factors support the conclusion that under either "test" the Government's task is the same; it must prove the existence of disqualifying facts, not simply facts that might lead to hypothetical disqualifying facts.
>
> . . . I conclude that the Court in *Chaunt* intended to follow its earlier cases, and that its "two tests" are simply two methods by which the existence of ultimate disqualifying facts might be proved. This reading of *Chaunt* is consistent with the actual language of the so-called second test; it also appears to be the meaning that the dissent in *Chaunt* believed the Court to have intended. 449 U.S. at 523-526.

In his dissent in *Fedorenko*, Justice Stevens also pointed out that the proper analysis of the *Chaunt* test of materiality should focus on whether a disqualifying fact actually existed with little or no weight attached on the basis of speculation about what might have been discovered if an investigation had been initiated. 449 U.S. at 537.

Although Justice White in his dissenting opinion in *Fedorenko* would shift the burden to the defendant on rebuttal, he too recognized that the ultimate determination hinged on whether there was proof of underlying facts which would or would not have justified denial of citizenship. 449 U.S. at 538 n.8.

The District Court herein evaluated *Chaunt* and *Fedorenko* in combination and held, "I have concluded that defendant's concealments and misrepresentations both singly and in the aggregate do not meet the requirements

of materiality under any of the formulations set forth above." (Pet. App. C, 135a).

In grappling with what it characterized as the "elusive" second prong of *Chaunt*, the Third Circuit was confronted with what should have been the dispositive finding by the District Court that, "The government's own proofs tend to establish that truthful answers by defendant would *not* have resulted in an investigation." (Pet. App. C, 136a, emphasis in original). Indeed, the petition for naturalization contains the notation "Investigation Waived" (J.A., 50). The naturalization examiner testified that he made that notation on the petition, "If he felt that an investigation would be a waste of time and money, that there would be no reason to believe that a field investigation would produce anything worthwhile or of any significance." (J.A., 153), and "Where in my opinion a field investigation would have no value, that the possibility of producing adverse information was negligible." (J.A., 164). A former Vice Consul who testified for the government admitted that out of the 1,500 visa applications he processed (J.A., 222), approximately 1,000 did not have authentic birth certificates, and as to the Lithuanian applicants, he may have made 2 or 3 inquiries. (J.A., 212). Nevertheless, the Third Circuit made a *de novo* finding that it was "unrebutted" that an investigation would have been conducted because of discrepancies between petitioner's actual date and place of birth and submitted documents. (Pet. App. A, 21a-22a).

The Third Circuit begs the issue in inferring that the discrepancies between the true date and place of birth and the submitted documents would have triggered an investigation. The test is not discrepancies but whether the disclosure of petitioner's true date and place of birth would

have been so significant as to cause an investigation as to whether he was inegligible for a visa. If the petitioner had set forth his correct date and place of birth on his visa application, there would have been no discrepancies since he would obviously have submitted consistent supporting documents.

No investigation was needed for a Vice Consul to determine whether petitioner was registered as a foreign resident with German civil authorities before the Allied occupation since petitioner disclosed on his visa application his residence in Poltringen, Germany from October 1944 to July 1945. (J.A., 30). Indeed, such residence in Germany before December 22, 1945 by a Lithuanian refugee from the Russian front established that he was a "displaced person" covered by the President's Directive of December 22, 1945 (Pet. App. F), and thus eligible for a priority in the issuance of a non-preference quota immigration visa under the published federal regulations (Pet. App. E, 140a-142a).

There is nothing in the record to indicate what police records were examined by Vice Consul Frank Schilling who actually processed petitioner and his wife's visa application, other than the notation "Police dossier available." (J.A., 33). The only residence permit produced by the government from their immigration files is the one obtained by Mrs. Kungys from the Provincial Council of Tuebingen (the District in which the Community of Poltringen is located) on February 13, 1945 (Pet. App. H, 159a). Obtaining such an innocuous permit from German civil authorities prior to the Allied occupation clearly did not make her ineligible for her immigration visa or trigger off an investigation that obtaining such a permit "tended" to show that she was not a Nazi persecutee.

The Register of Residents of Ammerbach (the municipality for the Community of Poltringen in Tuebingen District) contains the initial registration for the petitioner and his family on November 16, 1944. (J.A., 53-56). That document incorrectly records petitioner's date of birth initially as September 21, 1908, crossed out and replaced with the also incorrect date of October 4, 1913 and the incorrect place of birth as Kaunas. That document is replete with errors since it also places Kaunas in the wrong county of Taurage; contains the incorrect date and place of birth of Mrs. Sofia Kungys; contains birth dates of two of Mr. Kungys' brothers (Felix and Stanislaus) which would have them born within five months of each other; and the incorrect date of birth of Youzas Koncius, a fellow student of Mr. Kungys's brother. (J.A. 53, Lodging, R. 1219)[2] In apparent recognition by our Consulates of widespread errors contained in end of the war German civil records, none of those obvious discrepancies triggered off an investigation or prevented Mrs. Kungys, petitioner's brothers or Youzas Koncius from obtaining visas. (Amicus App. C, 32a).

A more realistic assessment of conditions in Germany at the time was made by former Chief Judge Aldisert in his dissenting opinion in *United States v. Kowalchuk*, 773 F.2d 488 (C.A. 3, 1985), *cert. denied*, 106 S. Ct. 1188 (1986) in noting that, "In Germany, the state had ceased to exist. A mass of civilians, freed persons and the first waves of 13

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[2] In the Third Circuit's flawed review of the record, it erroneously found that petitioner provided the Third Reich with his correct date and place of birth. The Register in fact contains the same false place of birth of Kaunas and false October 4, 1913 date of birth as his internal Lithuanian passport (J.A. 53, 56).

million refugees from Eastern Europe wandered the country." 773 F.2d at 500.

Notwithstanding the absence of any allegation in the Complaint or statutorily required government affidavit of good cause that petitioner misrepresented he was a Nazi persecutee or that obtaining a residency permit from the Third Reich negated eligibility for a quota immigration visa, the Third Circuit hypothesized that only victims of Nazi persecution were eligible for quota immigration visas and that the transmittal of a residency permit from one German civil authority to another in a printed form letter that indicated the permit was "without special conditions and restrictions" (J.A., 58-60) would call in to question petitioner's claim he was a victim of Nazi persecution. (Pet. App. A, 37a). In applying its "probability" standard, the Third Circuit proceeded from the false premise that the absence of being a Nazi persecutee was a "material" disqualifying fact under the second prong of *Chaun.*, by disregarding:

(a) The actual published regulation then in effect giving a first priority for non-preference quota immigration visas to "displaced persons" covered by President Truman's Directive of December 22, 1945 (Federal Register, 22 C.F.R. § 61.313(a)(3), Pet. App. E, 140a);

(b) The President's Directive of December 22, 1945 which directed the government "to facilitate full immigration to the United States under existing quota laws", and that "Visas should be distributed fairly among persons of all faiths, creeds and nationalities." (Pet. App. F, 148a-149a);

(c) The District Court's finding that the evidence showed that a former Vice Consul, who testified that the

requirement that quota visas be issued only to victims of Nazi persecution was in error on this point (Pet. App. C, 119a-120a n.7);

(d) The District Court's finding that the government did not prove that petitioner's claim that he participated in the anti-Nazi resistance movement in Lithuania (and was thus subject to persecution for high treason) was false (Pet. App. C, 120a n.7);

(e) The absence of any allegation in the Complaint or the statutorily required Affidavit of Good Cause as to any Nazi persecutee visa requirement or any such misrepresentation by petitioner; and

(f) The inability of the government to produce at trial or on appeal any regulation which granted non-preference quota immigration visas only to victims of Nazi persecution and which excluded refugees from the Russian front. (Lodging, R. 1298).

The Third Circuit engaged in that tour de force in apparent ignorance of both United States' non-preference quota immigration regulations (Pet. App. A, 33a n.10) as well as the German laws and regulations (before, during and after World War Two) which continuously required the registration of all residents, including foreigners.

Under the Third Reich, "Every foreigner over 15 years old, who wants to remain in the territory of the Reich longer than 48 hours, needs a special residence permit." Section 2.(1), Reichsgesetzblatt S. 1667, ber. S 1750. All persons, citizens as well as foreigners, must still register in Germany as set forth in Melderechtsrahmengesetz, 16 August 1980, Bundesgesetzblatt I 1429. Section 7 of the present German law on residency permits for foreigners,

Auslandergesetz, 28 April 1965, Bundesgesetzblatt I 353, contains the identical language as Section 3. (3) of 126c from the German law and regulations in effect during the Third Reich, Reichsgesetzblatt I S.1058 ber. S 1067. of August 22, 1938, to wit:

§ 3. (1) The residence permit (§ 2) is good for the territory of the Reich, when it is not restricted to certain parts of the territory of the Reich;

(2) The residence permit can be granted for a definite or indefinite time period;

(3) The residence permit can provide for conditions and requirements; and

(4) After the residence permit has been issued, it can be restricted in area and time, as well as provide for additional conditions and requirements. (Translated from the compilation of German laws as of April 1, 1944 by Dr. Carl Sartorius, Professor at the University of Tuebingen, a standard text found in law libraries in the United States, *Verfassungs und Verwaltungsrecht,* Dr. Carl Sartorius, Munich and Berlin, C. H. Beck, 1944, Library of Congress 46-12413; 349.43G37V).

Neither petitioner nor his wife received residency permits unrestricted as to the territory of the Reich or for an indefinite time period. Both petitioner's (J.A. 58-60) and his wife's (Pet. App. H, 159a) permits were restricted to the area of Wuerttenberg and Hohenzollern and both permits expired on February 1, 1947. Although no "special" conditions were imposed, additional conditions and requirements could have been imposed even after the permits were issued. The only reasonable inference that could be drawn from this innocuous conduct, is that the petitioner and his

wife complied with the bureaucratic requirements imposed on refugees as well as citizens of the Third Reich. Such conduct can hardly have any relevance or tendency to show ineligibility for a visa, let alone have any relationship to a non-existent requirement of being victims of Nazi persecution.

Moreover, even as to the straw man issue of the bogus Nazi persecutee visa eligibility requirement, the Third Circuit ignored the District Court's finding, based on testimony in the record it found credible, that the government had not disproved petitioner's claim that he was a participant in the anti-Nazi resistance in Lithuania and his arranging the escape of nine people from the Nazi S D during flight from the Russian Front and thus subjected himself to persecution for high treason. (Pet. App C, 119a-120a n.7) (See Lodging containing testimony of V. Vidiekunas, R. 916-918; Youzas Koncius, R. 1202-1216; Sofia Kungys, R. 1060-1070. See also District Court reference to supporting deposition of W. Janson, Pet. App. C, 114a).

Although denominated a "probability" test based on the second prong of *Chaunt,* the Third Circuit's diluted standard of proof was satisfied by sheer speculation, hypothesized tendencies and a bogus eligibility requirement for a quota immigration visa.

It is respectfully submitted that this case demonstrates that the possibility test and the probability test for materiality substitute speculation for proof and lead to the "hypothesized disqualifying facts," Justice Blackmun warned against in *Fedorenko.* Thus although denominated a "probability" test, the Third Circuit opinion severely dilutes the longstanding standard of proof required of the Government before it can deprive a naturalized citizen of

his "precious right." It would appear that only the certainty test is consistent with the *Schneiderman* standard of the heavy burden that the Government be required to prove its case by clear, unequivocal and convincing evidence which does not leave the issue in doubt. This is especially important since denaturalization cases are non-jury trials and in many recent cases the judges are subject to the "hydraulic pressure" of trying what are tantamount to war crimes' cases, as to which United States courts would not otherwise have jurisdiction.[3] Under the circumstances, the Government's burden of proof of materiality in a denaturalization case should not be diluted to less than that required of a simple tort case.

II.

The Burden of Proving Materiality By Clear, Unequivocal and Convincing Evidence Applies To Misrepresentations At The Visa Application Stage.

Petitioner's application for a visa (J.A. 30) contains the same incorrect date and town of birth as found in his petition for naturalization (J.A. 48). If the government is required to prove that a misrepresented date and place of birth in a petition for naturalization are material in order to denaturalize under Section 340(a) of the Immigration and Nationality Act, there appears to be no sound reason why the government should not also be required to prove that a misrepresented date and place of birth in a visa application are material in order to denaturalize under the same statute. Section 340(a) makes no distinc-

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[3] The District Court denied petitioner's motion to dismiss for lack of jurisdiction over war crimes under the "territoriality" clause of the Sixth Amendment to the Constitution. See Appellee's Brief to Third Circuit p.1. The Third Circuit opinion did not consider that issue raised by petitioner.

tion between stages and does not confine the materiality of a misrepresentation to the petition for naturalization stage. Instead it sets forth the requirement for materiality in order to denaturalize, presumably at whatever stage of the naturalization process the putative misrepresentation or concealment occurs. It seems equally sound to require that the standard for proving the materiality of the misrepresentation be the same clear, unequivocal and convincing evidence which does not leave the issue in doubt test as required by this Court to denaturalize since *Schneiderman*.

In *Fedorenko v. United States*, 449 U.S. 490 (1981), the government sought to revoke his citizenship both on the grounds of illegal procurement and of concealment and misrepresentation because he failed to disclose in his application for a visa that he had served as an armed guard at a Nazi concentration camp. Under Section 10 of the Displaced Persons Act, 62 Stat. 1013, 50 U.S.C. App. § 1959 (1951), "any person who shall willfully make a misrepresentation for the purposes of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." Fedorenko also misrepresented his place of birth. But, as the Court's majority opinion reasoned, "This does not, however, end our inquiry, because we agree with the Government that this provision only applies to willful misrepresentations about 'material' facts." 449 U.S. at 507.

Justice Marshall, writing for the majority, then went on to state, "[T]he misrepresentation that raises the materiality issue in this case was contained in petitioner's application for a visa. . . . *It is, of course, clear that the materiality of a false statement in a visa application must*

be measured in terms of its effect on the applicant's admissibility into this Country. See *United States v. Rossi*, 299 F.2d 650, 652 (C.A. 9, 1962)." 490 U.S. at 509. [Emphasis added].

As the District Court herein noted, "As to the visa application stage the Court held '[a]t the very least a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa.' 449 U.S. at 509." (Pet. App. C, 128a). That language in *Fedorenko* directly parallels the first prong of *Chaunt* of proving "materiality" by "clear, unequivocal, and convincing evidence . . . that facts were suppressed which, if known, would have warranted denial of citizenship." 364 U.S. at 355.

As the District Court herein further noted:

> Justice Blackmun, concurring, failed "to see any relevant limitation in the Chaunt decision or the governing statute that bars Chaunt's application to this case. By its terms, the denaturalization statute at the time of Chaunt, as now, was not restricted to any single stage of the citizenship process. Although in *Chaunt* the nondisclosure arose in response to a question on a citizenship application form filed some years after the applicant first arrived in this country, nothing in the language or import of the opinion suggests that omissions or false statements should be assessed differently when they are tendered upon initial entry into this country. If such a distinction was intended, it has eluded the several courts that unquestionably, have applied Chaunt's materiality standard when reviewing alleged distortions in the visa request process. 449 U.S. at 519." (Pet. App. C, 129a).

Further in his concurring opinion in *Fedorenko*, Justice Blackmun rejected the Fifth Circuit's "possibility"

test at the visa application stage since it "would have diluted materiality." 449 U.S. at 523. His reasoning is as equally applicable to the so-called "probability" test in the instant case in observing that, "If naturalization can be revoked years or decades after it is conferred, on the mere suspicion that certain undisclosed facts *might* have warranted exclusion, I fear that the valued rights of citizenship are in danger of erosion." 449 U.S. at 526 (emphasis in original).

Indeed, as stated by former Chief Judge Aldisert in his dissenting opinion in *United States v. Kowalchuk,*

> "The issue comes down to this: If this court, or any court, including the Supreme Court, adopts the literal meaning of one word 'might', as contained in *Chaunt,* then one word will wipe out an entire galaxy of settled case law." 773 F.2d 488, 515 (C.A. 3, 1985).

He concluded that the Third Circuit was bound by the "certainty" test for proving materiality at the visa stage as previously held by the Third Circuit in *United States v. Riela,* 337 F.2d 986, 989 (C.A. 3, 1964) in stating, "We require the government to prove not only that, had the correct information been available, an investigation would have been undertaken, but that it would have uncovered facts warranting visa denial." 773 F.2d at 515.

The government took the extreme position below that Section 101(f)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1101(f)(6) which provides that "No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is or was . . . (6)

one who has given false testimony for the purpose of obtaining any benefits under this Act," reaches any false statement at the visa application stage irrespective of materiality. (See Paragraph 49, Count IV of Amended Complaint, J.A. 17-18).

But the District Court herein held that the "illegal procurement" grounds for revoking citizenship alleged by the government (Counts II and IV) overlapped the misrepresentation grounds (Count V) and both were governed by the materiality test. (Pet. App. C, 123a). The Third Circuit herein agreed with the District Court and correctly adopted the view of the Tenth Circuit in *Sheshtawy* that the materiality test applies to the false testimony provisions of "illegal procurement" under § 1101(f)(6) stating: "We reject the proposition that the government can avoid the *Chaunt* materiality test by alleging illegal procurement in connection with section 1101(f)(6)". (Pet. App. A, 25a). Moreover, the misrepresentation as to petitioner's date and town of birth were not made for the purposes of "obtaining any benefits" under the immigration laws not otherwise available to him, since he was eligible for an immigration visa under the quota for Lithuania no matter on what date or in what city or town in Lithuania he was born.

In view of the requirement of proving materiality irrespective of whether the government proceeded on either the "illegal procurement" or "misrepresentation"

grounds under Section 340(a), as amended in 1961, the Court of Appeals did not reach the petitioner's contention that under *United States v. Riela*, 337 F.2d at 989, his denaturalization has to be governed by the laws in effect at the time of his naturalization and "illegal procurement" was not part of the immigration laws at that time. Indeed, his petition for naturalization made no reference to "illegal procurement" as a ground for revocation of citizenship. "Illegal procurement" was intentionally deleted as a ground for denaturalization when the McCarran-Walters Act was enacted in 1952 and was not reinstated as a ground for denaturalization under § 1451(a) until it was amended by the Act of September 26, 1961 (75 Stat. 650, 656).

At the trial the Government presented Seymour Finger, a former Vice Consul, who testified that a quota visa would routinely be denied as of February 1947 to an applicant who lied to a Vice Consul concerning his date and place of birth (J.A. 200). The testimony is unclear as to whether the witness meant to encompass in "place" of birth the material fact of country of birth which determined eligibility under a quota or the immaterial fact of the town or city of birth. In any event that testimony is not a basis for denaturalization which is distinguishable from the naturalization process, including at the visa application stage. *Berenyi v. District Director*, 385 U.S. 630, 636-637 (1967). Even as to the lesser status of being an alien, the issue is not whether a consul could have refused a visa but whether a *proper* refusal could have been made. At that time in order to justify refusal of a visa or exclusion upon entry, a suppressed fact had to be material which meant the fact suppressed had to have been a ground of exclusion under the law. *United States ex rel. Teper v. Miller*, 87 F. Supp. 285 (S.D.N.Y. 1949).

Indeed, the rule applied by the Attorney General as of 1956 was that "a misrepresentation is not material, when made during proceedings for admission into the United States, if the alien would not have been denied a visa or excluded had he told the truth." *Matter of G-M,* 7 I. & N. Dec. 40, 74 (Apr. 2, 1956). One of the leading authorities relied upon by the Attorney General was *United States ex rel. Iorio v. Day,* 34 F.2d 920 (C.A. 2, 1929). There the Second Circuit rejected the attempt to deport an alien who allegedly procured his visa by fraud by swearing he had never been imprisoned, and stated:

> "It is true that the relator was bound to tell the truth on his application, but if what he suppressed was irrelevant to his admission, the mere suppression would not debar him. . . So the first question comes down at most to whether the facts, had he disclosed them, would have been enough to justify the refusal of a visa or exclusion upon entry." 34 F.2d at 921.

At the time petitioner entered the United States in 1948, this view of the Second Circuit concerning the excludability of entry due to material misrepresentation had not yet been embodied in a statute. It originally appeared in Section 10 of the DPA and was codified in the Immigration and Nationality Act of 1952. 8 U.S.C. § 1182(a)(19).

The "probability" test of the Second Circuit in *Maikovskis v. INS,* 773 F.2d 435 (C.A. 2, 1985), *cert. denied,* 106 S. Ct. 2915 (1986) to determine materiality in a deportation proceeding against an alien endorsed the applicability of *Chaunt* to misrepresentations in visa documents, as have "all of the Courts of Appeals that have considered the issue". 773 F.2d at 441. In its brief to the Second Circuit, the government agreed that "all of the Courts of Appeals that have considered the issue deem the *Chaunt* test applicable to misrepresentations in visa documents",

but argued that the second prong should be the second prong of the Attorney General's opinion in *Matter of S- and B-C*, 9 I. & N. Dec. 436, 447 (Oct. 2, 1961) that "A misrepresentation made in connection with an application for visa or other documents, or with entry into the United States is material if either (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." The Third Circuit herein in following the Second Circuit in *Maikovskis* has adopted a diluted standard of proof at best applicable to aliens in a deportation proceeding which is not governed by Section 340(a), the denaturalization provision of the Immigration and Nationality Act.

In any event, the petitioner's misrepresentations as to his date and place of birth did not "shut off a line of inquiry" leading to his obtaining a residence permit "without special conditions" in the Third Reich since his visa application correctly disclosed residence in Poltringen under the German Reich. Moreover, as demonstrated *supra*, that "line of inquiry" was not relevant to his eligibility for a visa or the non-existent Nazi persecutee requirement. As the Attorney General opined more than a "remote, tenuous, or fanciful connection" between the misrepresentation and the investigation is required. 9 I. & N. Dec. at 448-49.

Whatever speculation former Vice Consul Finger engaged in as to whether he would have granted a visa to petitioner had he handled the application is not relevant for denaturalization purposes since vice consuls lose jurisdiction once an alien is naturalized. It is clear that the District Court was correct that no naturalization examiner would have conducted an investigation into the validity

of a visa issuance based on disclosure of discrepancies in date and place of birth. Former naturalization examiner Julius Goldberg testified on cross-examination that " . . . in my capacity as a naturalization examiner, if I obtained information that a person had given false information in previous applications as to his date and place of birth, I've had many, many, many such cases where people told me that the information contained in the visa was not true, that they obtained their visa using other identities, other documents." (J.A. 172) As to many of those cases he further testified that there was an avenue of relief under Section 241(f) of the Immigration and Nationality Act before an immigration officer and that "If they had the necessary period of residence and physical presence after that date, they could apply for naturalization, and generally there would be no further problem." (J.A. 173-174). If an incorrect date and place of birth were correctable misstatements in the pre-naturalization process, it would be unsound to transubstantiate them into "disqualifying facts" for denaturalization.

There appears to be no sound reason why there should be a different and diluted standard of proof in viewing misrepresentations at the visa stage where the statutory authority under which the government seeks to denaturalize is contained in a statute which requires materiality.

III.

The Decision Below Violated the Fifth Amendment and Rule 52(a) of the F.R Civ.P. and Constitutes Such An Arbitrary Threat to Citizenship By the Manner in Which It Imposed Its Admittedly Elusive "Probability" Standard That This Court Should Exercise Its Power of Supervision.

In addition to adopting a diluted test for "materiality," the Third Circuit herein applied its "probability"

test in a manner which "so far departed from the accepted and usual course of proceedings" as to "call for an exercise of this Court's power of supervision." [Sup.Ct.R.17.1 (a)]. After giving proper deference to the District Court's findings that an incorrect date and place of birth on an application for an immigration quota visa based on a correct country of origin were not "material" under the first prong of *Chaunt* (Pet. App. A, 20a), the Third Circuit made its own finding that it was "unrebutted" that discrepancies between the true facts as to his date and place of birth and submitted documents would have resulted in an investigation (Pet. App. A. 21a-22a). In doing so, the Third Circuit ignored the District Court's express finding that "The government's own proofs tend to establish that truthful answers by defendant would *not* have resulted in an investigation." (Pet. App. C, 136a), (emphasis in original).

Under Rule 52(a) of the Federal Rules of Civil Procedure and under this Court's holding in *Icicle Seafoods, Inc. v. Worthington*, 106 S. Ct. 1527 (1986) decided just two months prior, the Third Circuit was bound by the District Court's finding that no investigation would have resulted unless that finding was "clearly erroneous" and in no event should have made findings of its own. Indeed, the Third Circuit acknowledged that, "Insofar as our review involves findings of fact made by the district court after a non-jury trial, our review is limited to the clearly erroneous standard." (Pet. App. A, 3a). The Third Circuit then erroneously proceeded to give plenary review to the factual elements of (a) whether an investigation would have ensued; and (b) whether, under its test, such an investigation "probably" would have discovered a hypothesized "disqualifying fact" of not being a "victim of

Nazi persecution," separate and apart from the otherwise immaterial facts of his incorrect date and place of birth.

While the "ultimate" fact of "materiality" may be a mixed question of law and fact that requires the application of legal principles to the historical facts of a case, the factual component of whether *an investigation would have ensued* as bearing on the ultimate fact (materiality) is subject to review only under the clearly erroneous rule. *Pullman-Standard v. Swint,* 446 U.S. 273, 286-287 n.16 (1982). The Third Circuit had previously been clear as to the standard of review as to ultimate facts, stating, "It is the responsibility of an appellate court to accept the ultimate factual determination of the fact finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supporting evidentiary data." *Krasnov v. Dinan,* 465 F.2d 1298, 1302 (C.A. 3, 1972). Here the District Court reviewed the evidence, including the testimony of a former INS naturalization hearing examiner and a former Vice Consul presented by the Government, and made the subsidiary finding that "Certainly there was nothing which would excite suspicion in the fact that defendant was born in Reistru in the year 1915." (Pet. App. C, 136a).

Indeed, the notation "Investigation Waived" was made on petitioner's Petition for Naturalization (J.A. 50) because as the then INS examiner explained a field investigation would be routinely waived, "Where in my opinion a field investigation would have no value, that the possibility of producing adverse information was negligible." (J.A. 164). It is the Third Circuit's finding that an investigation by the naturalization examiner would have en-

sued and "would have tended to prove his ineligibility for a visa in the first instance" (Pet. App. A, 36a-37a) which is completely devoid of minimum evidentiary support. There was no requirement that only victims of Nazi persecution were eligible for quota immigration visas either at the time petitioner was naturalized in 1954 or at the time he was granted a visa in 1948. The District Court's finding that no investigation would have ensued was obviously not "clearly erroneous."

At the trial the government called as its witness Seymour Finger, who as a Vice Consul had processed visas at the U. S. Consulate in Stuttgart, Germany for eleven months ending in February 1947. Former Vice Consul Finger did not interview petitioner with respect to his January 1947 application for a visa, which was issued in March 1948, and had never even examined his immigration file except in connection with his trial preparation. (J.A. 206-207). Mr. Finger's testimony in 1983 as to what he would have done with respect to petitioner's application for visa had he had doubts as to whether he was a victim of Nazi persecution and had he processed it in 1947 is at best retrospective conjecture based upon a faulty memory. No Vice Consul had the right to impose his own subjective standard or fashion a new criterion which was not embodied in the regulations governing the issuance of non-preference quota immigration visas. Congress did not delegate any authority to Vice Consuls to make informal policies not contained in the published regulations or presidential directives.

It would have been a clear violation of visa procedure for Vice Consul Finger to have given preference to displaced persons who were victims of Nazi persecution to the exclusion of refugees from the Russian front who were

not Nazi persecutees. The Immigration Visa Procedure then in effect provided: "Under no circumstances should an applicant for a quota immigration visa be issued such a visa out of his proper turn with other qualified applicants in the same category, as this would have the effect of according the applicant an unauthorized preference over other qualified applicants having earlier priority." Note 11, 22 C.F.R. § 61.301.

Nevertheless, apparently focusing on only part of the testimony of Mr. Finger, the Third Circuit proceeded in its *de novo* review based on the false premise that only victims of Nazi persecution were eligible for quota immigration visas. The record shows that the complete testimony of Mr. Finger on the bogus Nazi victim visa requirement was that, "This policy was contained in regulations issued by the federal government under which we operated." (J.A. 218. See also J.A. 227-228), and that the government attorneys during his trial preparations had shown him the purported regulations. (J.A. 218-219, 228). No such regulations were produced or could be produced by the government or could have been shown to Mr. Finger since they never existed. (Lodging, R. 1298). The District Court correctly found that Mr. Finger was in error. (Pet. App. C, 119a-120a n.7). The actual regulation then in effect provided that "displaced persons" covered by the President's Directive of December 22, 1945 were eligible for a first priority as to non-preference quota immigration visas. (Pet. App. E, 141a). The absence of any corroborative evidence or any direct evidence to establish that only victims of Nazi persecution were eligible for quota visas should have made Mr. Finger's testimony of no probative value to the Third Circuit.

There is no historical evidence that the category "displaced person" was coterminous with "victim of Nazi persecution" for any purpose, let alone visa eligibility. "Displaced person" to determine eligibility for United Nations Relief and Rehabilitation Administration ("UNRRA") assistance is defined in part 5.a. as "United Nations nationals who have been displaced as a result of the war from their countries of origin, citizenship, or previous residence" and the examples used in 5.a.(2)(a) expressly include "Former residents of Estonia, Latvia and Lithuania" as "United Nations nationals *prima facie* to be eligible." UNRRA Order No. 52, June 24, 1946 (Amicus App. I, 76a-77a). "Persecutees" was a separate category 5.b. and such persons did not have to be displaced "as a result of the war" and were eligible for UNRRA care "irrespective of the date they left their country or place of residence" (*id*, at 77a). Annex I of the Constitution of the International Refugee Organization ("IRO") signed by the United States on December 16, 1946, in Section A.2 defines the term "refugee" so that it "also applies to a person, other than a displaced person as defined in section B of this Annex, who is outside of his country of nationality or former habitual residence, and who, as a result of events subsequent to the outbreak of the Second World War, is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality." (Amicus App. J, 104a-105a).

The contemporaneously published Monthly Reviews of the Department of State, Immigration and Naturalization Service make no reference to limiting quota visas to victims of Nazi persecution. The January 1946 issue reported that "On December 22, 1945 President Truman

announced a far reaching program to facilitate the admission into the United States, within the framework of existing immigration laws and regulations, of displaced persons and refugees from Europe;" and emphasized that "The major group affected by President Truman's Directive of December 22, 1945 are displaced persons and refugees who are natives of Central and Eastern Europe and the Balkans." (Amicus App. B, 25a) The November 1946 issue reported that INS Commissioner Ugo Carusi, who was designated by President Truman to serve as Chairman of the interdepartmental Committee to implement the Directive of December 22, 1945, made a trip in March 1946 with the head of the Visa Division of the State Department, "to discover who the displaced persons were" and "to establish categories to describe those persons who could properly be described as displaced persons." (Amicus App. C, 30a-31a). After consultation with UNRRA, the Army and interested voluntary relief agencies, Comm. Carusi further reported five categories of "displaced person" and that, "Roughly stated, we did include . . . those who were forced to evacuate their homes for military reasons other than for service in the army, [and] persons who feared to return to their homes because of possible religious or political persecution . . ." (*id*, at 31a) (Brackets added). Comm. Carusi also astutely observed that,

> "For obvious reasons, many people are without birth or baptismal certificates and the Consuls are empowered to make allowances and use discretion in the matter of accepting unsupported statements. Many of these people have become suspicious of authority and have trained themselves over a period of years to lie in self preservation." (*id*, at 32a).

Petitioner as a former Catholic seminarian and Lithuanian army officer fit within the categories of Lithuani-

ans who were designated by the NKVD for liquidation and imprisonment. See *Soviet Genocide in Lithuania*, Pajaujis-Javis, Library of Congress, 79-84640 at pp. 23-25, 38-42, and Hearings Before Select Committee on Communist Aggression, 83rd Congress, Second Session, 1954. His wife was rounded up by the Soviets only to receive a fortuitous reprieve (R. 1053). His father, a young sister and brother, who remained behind on their Lithuanian farm when petitioner, his wife and some of his brothers and sisters left in October 1944 as bombs were exploding on the farm, were sent by the Soviets to Mongolian concentration camps for ten years (J.A. 76). It is clear that petitioner came within the definition of "displaced person" as contemplated by the Truman Directive.

Furthermore the statistical reports of the INS, as to the composition of the "displaced persons" actually admitted to the United States on quota immigration visas issued pursuant to the President's Directive of December 22, 1945, negate the Third Circuit's uncorroborated hypothesis that only victims of Nazi persecution were eligible for such visas. During the period from December 22, 1945 to November 30, 1947, 26,801 displaced persons from over 40 countries in four continents were issued quota immigration visas under the President's Directive. (Amicus App. D, Table No. 1, 389a). That statistical compilation graphically demonstrates that U. S. Consulates used the comprehensive definition of "displaced person" in implementing the Presidential Directive of December 22, 1945 embodied in the regulations as published in the Federal Register (22 C.F.R. § 61.313) and not the narrow, partial definition of "refugee" which "also applies to persons who, having resided in Germany or Austria, and

being of Jewish origin or foreigners or stateless persons were victims of Nazi persecution" as contained in the IRO Constitution. (Amicus App. J, 105a).

Despite this plethora of accessible historical facts showing the wide scope of eligibility of displaced persons for non-preference quota immigration visas under the published regulations and the Truman Directive incorporated therein, the Third Circuit viewed the Truman Directive in isolation. It sidestepped the incorporation of the Truman Directive in the regulations as a basis for a priority in the issuance of non-preference quota immigration visas to "displaced persons covered by the Presidential Directive of December 22, 1945" by devoting a mere footnote to its misreading of the President's Directive of December 22, 1945 as speaking "only in general terms concerning the need to resettle displaced persons and particularly orphaned children." (Pet. App. A, 33a n.10). In fact, the median age of the 28,789 displaced persons admitted under the regulations was 31.9 years, with only 6,961 immigrants being under 21 years old (Amicus App. D, 40a), and the generality of the term "displaced persons" reflected the comprehensive scope of the persons to be resettled in the United States under the existing quota laws.

President Truman's Directive of December 22, 1945, as incorporated in 22 C.F.R. § 61.313(a)(3) remained operative for displaced persons and refugees receiving quota immigration visas regardless of race, religion or nationality until the June 25, 1948 enactment of the Displaced Person's Act of 1948, which defined "eligible displaced person" in Section 2(c) to "embrace three general classes: (1) persons who were brought into Germany by the Nazis as forced laborers; (2) persons who fled to the west before

the advancing Russian armies, and (3) persons, chiefly of Jewish origin, who fled from Germany or Austria during the Nazi regime and who have returned but who have not been resettled." *Displaced Persons In Europe,* Report of the Senate Committee on the Judiciary, Report No. 950, p. 54. The phrase "victims of Nazi persecution" as contained in the Annex to the IRO Constitution was only a partial definition of a sub-category of refugee, which was incorporated as a sub-part in the comprehensive definitions of Section 2(b), "Displaced person" and Section 2(c) "Eligible displaced person" of the Displaced Persons Act of 1948.

Petitioner, however, was issued his non-preference quota immigration visa under the quota for Lithuania in March, 1948 prior to the June 1948 enactment of the Displaced Persons Act of 1948. Even if Seymour Finger issued visas under the German and Austrian quotas only to victims of Nazi persecution, neither he, nor any other Vice Consul, could have excluded from the issuance of visas under the Lithuanian quota, refugees, such as petitioner, who fled to the west before the advancing Russian armies.

As to whether an investigation would have been conducted at the visa application stage, former Vice Consul Finger did not testify that he would inquire of the police whether an applicant had obtained a residency permit from the Third Reich as part of his considering whether he was a victim of Nazi persecution. Moreover he conceded that while he could direct inquiries to the displaced persons' camps, in fact he "rarely" did so. (J.A. 212). Out of 30 to 35 Lithuanians' applications for visas processed by

him, he made 2 or 3 inquiries to the Lithuanian representatives in the displaced persons' camps, although approximately one-third of the Lithuanian applicants had certificates similar to petitioner's from the Ex-Political Prisoner's Committee. (J.A. 220).

There was no need for the Third Circuit to speculate as to what an inquiry by a Vice Consul to the Lithuanian camp representative "probably" would have disclosed, since Vydaudas Vidiekunas, who signed petitioner's certificate (J.A. 29) as Secretary of the Lithuanian Ex-Political Prisoner's Committee testified at the trial below. The District Judge, who personally interrogated the witness, noted in his findings of fact, "Vidiekunas testified, truthfully I am convinced." (Pet. App. C, 115a). Vidiekunas, a former Lithuanian lawyer, testified that after being liberated by the Allies, the Lithuanian refugees in Germany organized a society of former prisoners from Nazi camps and prisons and that he was elected Secretary. In order to protect Lithuanian refugees from being ousted from the Baltic camps as a result of "screenings" by Soviet representatives of UNRRA (J.A. 69-70), his committee established a procedure for issuing certificates to Lithuanian refugees upon written proof from two witnesses that the refugee was active in the Lithuanian resistance against the Nazis. (Lodging, R. 913-914). The petitioner applied for his certificate on February 28, 1946 — 11 months before he even applied for a visa and the certificate was granted on June 18, 1946, after the committee received testimony from two witnesses that petitioner, and a fellow prisonmate of Vidiekunas, organized an underground newspaper with stolen printing presses hidden in old forts outside Kaunas. (Lodging, R. 917).

The District Court also found "some independent support for defendant's claim he performed work for the resistance" in Janson's testimony that petitioner distributed to him underground newspapers urging resistance to German mobilization. (Pet. App. C, 114a).

Vidiekunas further testified that petitioner's conduct in so assisting the Lithuanian resistance subjected him to the risk of being executed for high treason by the Nazis. (Lodging, R. 918). Petitioner was one of less than 200 persons who were issued the certificate by his committee and the purpose of issuing the certificate was not to assist Lithuanians in obtaining visas to the United States (Lodging, R. 919). Vidiekunas never heard that quota immigration visas were restricted to persons who were victims of Nazi persecution. (Lodging, R. 923).

Contrary to this Court's holding on April 21, 1986 in *Icicle Seafoods, Inc. v. Worthington, supra* at 1530, that, in reviewing a federal non-jury trial, a Court of Appeals "should not simply have made factual findings on its own", the Third Circuit after making its *de novo* finding of fact that an investigation would have ensued as a result of the discrepancy between petitioner's correct date and place of birth in some local records[4] and the incorrect date

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[4] The Third Circuit's review of the record was faulty in asserting that petitioner gave his correct date of birth to the Tuebingen authorities under the Third Reich and an incorrect date of birth to the Tuebingen authorities during the Allied occupation. Government Exh. J-13 (J.A. 53-54) is the original entry document, the Register of Residents from the Office of the Mayor, Municipality of Ammerbach, Tuebingen District for the Community of Poltringen and it records the same incorrect place of birth of Kaunas and date of birth of October 4, 1913

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and place of birth on the visa application, made the additional finding that petitioner received a residence permit to reside in the rural community of Poltringen "without special conditions." (Pet. App. A, 32a). From that residence permit, the Third Circuit drew the unsupportable inference that "This information would tend to discredit the defendant's claim that he was persecuted by Nazi Germany." (Pet. App. A, 32a).

Since all refugees had to register with local authorities and thereby obtained residence permits "without special conditions"[5] (other than prisoners of war) (Lodging, R. 843), the only supportable inference from the residence permit is that petitioner was a refugee who resided in that community. See Point I, *supra,* at pp. 17-18.

The residence permit is irrelevant to whether at a prior time and place petitioner was active in the anti-Nazi resistance in Lithuania as corroborated by two trial witnesses. Moreover, the petitioner truthfully disclosed on his visa application his residence in Poltringen (a community in Tuebingen District) commencing in October 1944. (J.A. 30). Indeed, his wife's INS "A" file contained the Tuebingen residence permit issued by that Provincial Council to foreign refugees before that com-

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set forth in petitioner's Lithuanian passport and visa application. Indeed, petitioner's correct date of birth is reflected in the *post* Allied occupation of Poltringen records as set forth in Exh. J-3T, J-5T, J-7T, J-8T and J-9T. (J.A. 60-61, 65-68).

[5] The residence permits issued at that time by the Provincial Council for Tuebingen to Mrs. Kungys was a simple identification document which did not even contain the words "without special conditions or restrictions" and was in fact restricted as to area and duration. (Pet. App. H, 159a).

munity was liberated by the Allies (Pet. App. H). Those historical facts were obviously not a matter of concern or suspicion to the Vice Consul who processed together petitioner's and his wife's visa applications. Nor were residence permits issued to refugees by provincial councils before the end of the war an impediment to issuing a visa for petitioner, his wife, or any other refugee.

Moreover, the presumption is that the Vice Consul followed the normal procedures required by the regulations and either was satisfied with the Tuebingen residence permit in the file or, in fact checked the police records in Tuebingen District for the periods before and after the Allied occupation as indicated by the notation "Police dossier available" on petitioner's visa application. (J.A. 33). Presumably, the Tuebingen police would have confirmed that petitioner and his wife were issued residence permits since they were once registered there. Evidently the Vice Consul was more concerned that the police had no record of bad conduct, than whether there were incorrect dates of birth in the records of a rural community where there were numerous errors. (J.A. 53). There is nothing in the regulations or the presidential directive that indicates a Vice Consul also was required to determine if the petitioner was a victim of Nazi persecution.

Petitioner did not thwart any investigation by Vice Consul Schilling by misstating his date and place of birth. There is no possibility, let alone a probability, that any amount of investigation could uncover facts leading to a non-existent visa requirement that petitioner had to be a victim of Nazi persecution. Petitioner did not force the Vice Consul into any hasty decision. Petitioner had to wait fourteen months from the time of his application on

January 9, 1947 until the visa was granted on March 4, 1948. (J.A. 33).

The District Court found, "Defendant's flight from Lithuania and eventual settlement in Germany is best described by Youzas Koncius, who for the last 27 years has been a high school teacher in Illinois and whose testimony has the ring of complete truthfulness." (Pet. App. C, 115a). Koncius testified that he left Lithuania with petitioner and his family of eight in horses and wagons as shells were exploding on the farm of petitioner's father in October 1944, that they proceeded to the nearby German border along with long columns of other refugees, that they were stopped by the German S D and forced to dig ditches at gunpoint until petitioner organized an escape, that the ultimately got as far west as possible to where the Allies would come, that shelters were established in Tuebingen County by local civil authorities, including the Catholic farm community of Poltringen, where they along with Allied prisoners of war, assisted farmers, and that there were thousands of refugees in camps in Germany. (Lodging, R. 1216).

Nevertheless, the Third Circuit ignored the findings of the District Court based on the credible testimony of Koncius, Vidiekunas and Janson and drew its own inference from a residence permit to live as a refugee in a rural community shortly before the Allies liberated the area, that it would "tend to discredit" petitioner's claim he was "persecuted by the Nazis." Proceeding from that unwarranted inference, the Third Circuit reached the false conclusion that petitioner was not eligible for a non-preference, quota immigration visa. (Pet. App. A, 32a-33a).

In various criminal contexts (to which these cases bear a closer resemblance than a common law civil case,) this Court has repeatedly held that the use of an administrative presumption or an inference (such as whether an investigation would have ensued or whether the issuance of a residence permit "without special conditions" negated being eligible for a visa) to eliminate an element of the prosecution's proof violates due process. See *Francis v. Franklin,* 105 S. Ct. 1965 (1985); *Sandstrom v. Montana,* 442 U.S. 510 (1979); and *Mullaney v. Wilbur,* 421 U.S. 684 (1975).

There is nothing on the visa application to even suggest that the absence of being a victim of Nazi persecution is an excludable class although it set forth 31 classes of excludable persons. (J.A. 31-32). The former Vice Consul who actually processed petitioner's visa application had no recollection of any such requirement. (J.A. 175). Former Vice Consul Frank Schilling was asked by petitioner's counsel: "Let me ask you rather pointedly, whether or not in order to gain an immigration quota visa you had to have been in fact a victim of Nazi persecution?" and he answered: "No. That I don't remember." (J.A. 175). That Trial Exhibit was not included in the Appendix before the Third Circuit because the Government did not even raise the issue of any such requirement in its required Statement of the Issues before the Third Circuit in its Civil Appeal Information Statement, which is relied upon when preparing the Appendix in the Third Circuit.

When trial counsel for petitioner proferred the State Department Circular of July 8, 1947 (Pet. App. G, 152a-155a), it was rejected by the District Court on the grounds, "It is of marginal relevance." In response to

trial counsel's argument, "Its only of marginal relevance if Your Honor accepts the argument that there was no such regulation about being a victim of Nazi persecution. Court: Nobody has shown it to me yet. Mr. Lynch [OSI trial attorney] have you shown me such a regulation? Mr. Lynch: No, sir." (Lodging, R. 1298). (Brackets added).

The Statement and Directive of President Truman of December 22, 1945 (Pet. App. F, 143a-151a) incorporated in regulation, § 61.313(a)(3)(i)(c), makes no reference to any requirement that displaced persons or refugees also had to be victims of Nazi persecution or that they were coterminous. To the contrary it expressly states, "This Government should take every possible measure to facilitate full immigration to the United States under *existing* quota law." (Emphasis added) (Pet. App. F, 148a). There was nothing in the then existing quota law that required an immigration visa recipient to be a victim of Nazi persecution.

Neither the Complaint, nor the Amended Complaint, nor the statutorily required Affidavit of Good Cause in support of those Complaints, nor the Pre-Trial order limiting proof, alleges either that petitioner misrepresented that he was a victim of Nazi persecution during either the visa or naturalization proceedings or that the lack of being a victim of Nazi persecution was a disqualifying fact making the petitioner ineligible for a non-preference immigration quota visa. Nor did the Government's Civil Appeal Information Statement, Statement of Issues or Briefs on Appeal raise those issues. The Third Circuit's faculty *de novo* fact finding and issue creation

without notice to the petitioner violate his right to due process under the Fifth Amendment. *See Dunn v. United States,* 442 U.S. 100 (1979), *Pullman-Standard v. Swint, supra,* and *Icicle Seafoods, Inc. v. Worthington, supra.*

Unlike the Third Circuit in the instant case, this Court has refused to consider matters outside the Complaint in denaturalization cases. The Government's proof in a denaturalization proceeding is limited, as in a criminal proceeding, to matters charged in the Complaint, *Schneiderman v. United States,* 320 U.S. 118, 160 (1943). There could be no clearer violation of due process of law than here where the Third Circuit has injected its own issue and developed its own false factual predicate in total disregard of the pleadings, the District Court's findings of fact and the trial record of evidence. The Third Circuit ignored Exhibit 38-D, (J.A. 174-180), the transcript of former Vice Consul Frank Schilling who actually processed petitioner and his wife's visa applications; Exhibit C-1 (Pet. App. H, 156a-159a) — Mrs. Kungys' residence permit from Tuebingen prior to the Allied occupation; and Exh. 54-D for id. (Pet. App. G, 152a-155a) — the Department of State circular, dated July 8, 1947, "Information Concerning Immigration Into the United States From Germany and Austria" showing that visas were issued to "displaced persons" and containing no requirement of being a victim of Nazi persecution. Moreover, even as to the Third Circuit's straw man issue, the Third Circuit ignored the deposition testimony of Walter Janson (Dep. 40, 44-48, 54) which the trial court found was "some support for defendant's claim he performed work for the resistance." (Pet. App. C, 114a).

That the hypothesized "Nazi persecution" requirement for a visa is a bogus revision of historical fact is farther demonstrated by the District Court's review and analysis in *United States v. Kairys,* 600 F. Supp. 1254 (N.D.Ill. 1984), *aff'd,* 782 F.2d 1374 (C.A. 7, 1986), *cert. denied,* 106 S. Ct. 2258 (1986), where it is noted that even "a German who voluntarily served in such units as the Waffen SS was eligible to be a quota immigrant." *Id,* at 1266 n.5).

It is certain that no amount of investigation at either the naturalization or visa stage could have discovered a non-existent requirement that only victims of Nazi persecution were eligible for quota immigration visas. It is equally certain that it is unclear as to what significance, if any, attached to the transmittal of a residency permit with a form letter on which it was printed "without special condition." At best, it is equivocal and still leaves in doubt whether such a permit had any bearing on whether its recipient was otherwise a victim of Nazi persecution.

The admonition of Chief Judge Aldisert to his brethern on the Third Circuit in his dissenting opinion in the *en banc United States v. Kowalchuk* decision is especially apt:

> "I quickly recognize that it is always difficult to reconstruct what actually happened at any point in history, and more difficult still when the events of consequence occurred during totally devastating wartime conditions, in enemy territory, over forty years ago. Indeed, this realization lies at the core of the due process issues. . . In all cases, an appellate court should adhere closely to the district court's determination of witness credibility; under these special

conditions, this requirement assumes a *fortiori* proportions." 773 F.2d 488, 499 (C.A. 3, 1985).

The manner in which the Third Circuit applied its so-called "probability" test for the second prong of *Chaunt* in this case is a clear illustration as to why this Court should not permit a dilution of the clear, unequivocal and convincing burden of proof on all the issues at each stage of the proceedings before a citizen can be denaturalized. It is especially important because only a certainty test can prevent a miscarriage of justice when judges have to apply the law under the hydraulic pressure of the gruesome allegations which accompany this decade's wave of denaturalization cases. Indeed, the Third Circuit's opinion shows an unnecessary preoccupation with the Soviet evidence on atrocities, although it did not reach the issue and thus did not reverse the District Court's holding that the Soviet evidence was unreliable and inadmissible.

Under the rubric of a "probability" test for materiality under the second prong of *Chaunt*, the Third Circuit has reached a legal conclusion so totally devoid of evidentiary support as to amount to no evidence at all; and it has done it in a way so detached from the allegations in the pleadings and the controlling standard of review of the District Court's findings as to render this revocation of citizenship an unconstitutional deprivation of due process of law.

CONCLUSION

For the various reasons set forth herein the judgment of the Third Circuit should be reversed and the matter remanded to the District Court for reinstatement of its judgment dismissing the complaint.

Respectfully submitted,

DONALD J. WILLIAMSON
Counsel of Record
WILLIAMSON & REHILL, P.A.
Attorneys for Petitioner

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On the Brief

DONALD J. WILLIAMSON
MICHAEL F. REHILL
IVARS BERZINS